U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 10 January 2007

BALCA Case No.: 2005-INA-172
ETA Case No.: P2000-CA-09508823/GH

In the Matter of:

STAFFING SERVICES,
Employer

on behalf of

ROSA FRANCISCA MORENO,
Alien.

Certifying Officer: Martin Rios
San Francisco

Appearances: W. Kenneth Teebken, Esquire
La Habra, California
For the Employer

Before: **Burke, Chapman and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of its application for labor certification. Permanent alien labor certification is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R.").[1] We base our decision on the record upon which the CO denied

[1] This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal

certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On December 28, 1999, the Employer, Staffing Services, filed an application for alien employment certification on behalf of the Alien, Rosa Francisca Moreno, to fill the position of Data Entry Clerk. (AF 167-168). Minimum requirements for the position were listed as two years of experience in the job offered.

The Employer received twenty-four applicant referrals in response to its recruitment efforts, all of whom were rejected as unqualified, uninterested or unavailable for the position. (AF 170-175).

A Notice of Findings (NOF) was issued by the CO on October 23, 2002, citing the Employer's two year experience requirement as unduly restrictive for the entry level position of data entry operator. (AF 162-165). In response, the Employer elected to amend its experience requirement to six months and to re-advertise the position. Accordingly, the matter was remanded to the State Workforce Agency to supervise a new test of the labor market. (AF 150-161).

The Employer received thirty-five applicant referrals in response to its re-recruitment efforts, all of whom were rejected as unqualified, uninterested or unavailable for the position. (AF 65-70).

A second Notice of Findings (NOF) was issued by the CO on September 10, 2003, requesting further documentation on the lawful rejection of U.S. workers. (AF 61-63). The CO found that the Employer's recruitment report lacked specificity and sufficient detail regarding the Employer's contact of the applicants. Noting that the Employer's recruitment report stated that

---

Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

each of the applicants was contacted "via telephone" to schedule an interview, and that 17 applicants "confirmed" their appointment but "did not show for the interview," the CO found the number of "no shows" excessive and requested further documentation. Specifically, the CO instructed:

> The employer's rebuttal **must** also provide the following information:
>
> The name and title of the individual who contacted each applicant on April 1, 2003
> The specific time(s) was each [sic] applicant called on April 1, 2003
> Clarify whether the employer actually spoke with applicants when they were called, or whether messages were left on answering machines
> Clarify how applicants "confirmed" the interview appointment
> Specify if applicants were offered an opportunity to reschedule the interview
>
> Any documentation of the employer's recruitment efforts, such as telephone bills, contemporaneous notes, or other evidence should be submitted.

In addition, the CO found that the Employer's rejection of U.S. workers because they wanted "more money" or a "managerial" position was unlawful unless the Employer documented that the applicant was offered and declined the job under the offered terms and conditions.

In Rebuttal, the Employer submitted copies of letters, dated April 1st, allegedly sent to each of the applicants for scheduled interviews on April 4th or 7th. In addition, the Employer reiterated its recruitment report, stating that all applicants were contacted "by an assistant from Staffing Services," "via telephone." (AF 15-60).

A Final Determination denying labor certification was issued by the CO on December 16, 2003, based upon a finding that the Employer had failed to adequately document lawful rejection of the twenty-one cited U.S. worker applicants. In finding the Employer's rebuttal insufficient, the CO noted that the Employer failed to provide any specific information for each of the applicants cited. The Employer neither identified the person contacting the applicants nor clarified whether the Employer's representative spoke directly to each applicant, "via telephone," nor whether telephone messages were left. The Employer did not address the high number of

"no shows" of purportedly "confirmed" applicants, or the NOF's finding that applicants were unlawfully rejected because they wanted "more money" or a "managerial" position. (AF 12-14).

The Employer filed a Motion for Reconsideration, which was denied. The matter was referred to this Office and docketed on May 16, 2005. (AF 1-11).

DISCUSSION

Initially, we note that the Employer's January 15, 2003 filing was titled "Motion for Reconsideration" and was addressed to the CO. (AF 4). Nowhere in this filing is there any indication that the Employer was seeking BALCA review. Thus, it is not clear that the Employer intended for the application to be transmitted to BALCA. After BALCA docketed the case and issued a briefing schedule, the Postal Service returned the first Notice as undeliverable to the Employer's attorney. After determining the attorney's current address, the Board issued an Order extending the time for filing of a brief in this matter. Neither the Employer nor its attorney nor the Alien filed a statement of position or an appellate brief in response to either the initial notice or the follow-up order.

Assuming that this Appeal is properly before us, we affirm the CO's denial of certification.

Federal regulations at 20 C.F.R. 656.21(b)(6) state that the employer is required to document that if U.S. workers have applied for a job opportunity offered to an alien, they may be rejected solely for lawful job related reasons. This regulation applies not only to an employer's formal rejection of an applicant, but also to a rejection which occurs because of actions taken by the employer. Section 656.20(c)(8) requires that the job opportunity be clearly open to any qualified U.S. worker. Implicit in the regulations is a requirement of good faith recruitment. *H.C. LaMarche Ent. Inc.,* 1987-INA-607 (Oct. 27, 1988). Actions by the employer which indicate a lack of good faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are thus a basis for denying certification. In such

circumstances, the employer has not proven that there are not sufficient United States workers who are "able, willing, qualified and available" to perform the work. 20 C.F.R. § 656.1.

In the instant case, the CO challenged the Employer's basis for rejection of numerous qualified U.S. workers. The Employer rejected seventeen applicants as "no shows" for their scheduled interviews. In addition, the CO questioned Employer's rejection of several applicants who the Employer reported wanted more money or managerial positions.[2] The CO was specific in regards to the evidence required to rebut, instructing the Employer to provide the name and title of the individual who contacted each applicant and the specific time(s) each applicant was called. The Employer was also instructed to clarify whether its personnel actually spoke with each of the applicants when contacted "via telephone" or whether a message was left. The CO requested clarification on how applicants "confirmed" the interview appointment and whether they were offered an opportunity to reschedule. The CO also requested any documentation of the Employer's recruitment efforts, such as telephone bills, contemporaneous notes, or other available evidence.

The Employer's rebuttal was largely unresponsive to the NOF. The Employer chose to do little more than reiterate what had already been submitted, stating that each applicant had been contacted "via telephone." The Employer stated that the applicants were contacted "by an assistant from Staffing Services" but failed to identify the individual. The time of contact was not reported. Nor were any contemporaneous notes or telephone bills submitted. The Employer failed to clarify whether the Employer (or its "assistant") actually spoke with any of the applicants, how the applicants "confirmed" the interview appointment, or whether they were offered the opportunity to reschedule. With rebuttal, the Employer submitted copies of unsigned

[2] We take administrative notice that this same Employer's nine earlier appeals to BALCA exhibited substantially similar circumstances, i.e., significant numbers of apparently qualified U.S. applicants were all rejected, and little in the way of convincing documentation was submitted to establish that good faith efforts were made to contact those applicants. *See Staffing Services*, 2003-INA-41, 53, 54, 55, 86 (Sept. 17, 2003) (rejecting 50 U.S. applicants); *Staffing Services*, 2004-INA-95 (Feb. 2, 2006) (rejecting 48 U.S. applicants); *Staffing Services*, 2004-INA-102 (Jan. 12, 2006) (rejecting 17 U.S. applicants); *Staffing Services*, 2004-INA-107 (June 16, 2004) (rejecting 62 U.S. applicants); *Staffing Services*, 2004-INA-129 (June 16, 2004) (rejecting 45 U.S. applicants).

letters dated April 1 allegedly sent to the applicants; however, no explanation was provided regarding the letters or why they were not previously discussed or submitted.

The Board in *M.N. Auto Electric Corp.,* 200-INA-165 (Aug. 8, 2001)(*en banc*), *citing Gencorp,* 1987-INA-659 (Jan. 13, 1988)(*en banc*), noted that although a written assertion constitutes documentation that must be considered, a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof. To document initial or follow-up telephone conversations, the Board in *M.N. Auto Electric, supra,* instructed:

> An employer must, at a minimum, keep reasonably detailed notes on the conversation (e.g., when the call was made, how long it lasted, whether there was a successful contact with the applicant, the substance of the conversation. Pre-prepared checklists may be helpful in documenting what was discussed with the applicants). Where available, phone records showing the time and duration of the phone contacts should be submitted by Employer.[14] *M.N. Auto Electric Corp., at* 12.

The Employer's motion for reconsideration contained attachments with copies of phone lists and the Employer's notes about the contacts. (AF 9-10). The regulations preclude consideration of evidence which was not "within the record upon which the denial of labor certification was based." 20 C.F.R. §656.26(b)(4). *Fried Rice King Chinese Restaurant*, 1987-INA-518 (Feb. 7, 1989) (en banc). Under the controlling regulatory scheme, rebuttal following the NOF is the employer's last chance to make its case. *Carlos Uy III*, 1997-INA-304 (March 3, 1999) (*en banc*). Thus, it is the employer's burden at that point to perfect a record that is sufficient to establish that a certification should be issued. *Id.* Therefore, the additional documentation submitted by the Employer of its attempt to contact the U.S. applicants submitted with the motion for reconsideration cannot be considered by the Board on appeal.

In the instant case, the CO requested specific documentation of contact and the Employer chose to disregard the CO's instructions. The Employer took a minimalist approach in rebuttal to documenting its recruitment efforts. Inasmuch as the Employer has the burden of production and persuasion on the issue of lawful rejection of U.S. workers, *Cathay Carpet Mill, Inc.,* 1987-INA-161 (Dec. 7, 1988)(*en banc*), we conclude that labor certification was properly denied. The

Employer has not met its burden to show that U.S. workers are not able, willing, qualified or available for this job opportunity.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED** and labor certification is **DENIED.**

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.